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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. [redacted] 168

FRED L. SHUTTLESWORTH,
Petitioner,
vs.
CITY OF BIRMINGHAM.

BRIEF AND ARGUMENT

Of Respondent City of Birmingham in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama.

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INDEX.

Page

Jurisdiction 1
Citations and argument relating to the jurisdiction of this court to entertain certiorari in this case 2
Facts relating to the arrest of petitioner 4

Cases Cited.

Accardo v. State, 268 Ala. 293, 105 So. 2d 865 2
Barbour v. State of Georgia, 249 U. S. 454, 39 S. Ct. 316, 317 3
Duckett v. State, 257 Ala. 589, 60 So. 2d 357 2
Ex Parte Cranmore, 273 Ala. 4, 129 So. 2d 688 2
Ex parte Davis, 269 Ala. 58, 110 So. 2d 306 2
John v. Paullin, 231 U. S. 583, 34 S. Ct. 178, 179, 58 L. Ed. 381 3
Ladd v. State, 266 Ala. 586, 98 So. 2d 59 2
Louisville & Nashville Railroad Company v. Woodford, 234 U. S. 46, 34 S. Ct. 739, 741 3
McDonald v. Amason, 267 Ala. 654, 104 So. 2d 719.. 2
Michel v. State of Louisiana, 340 U. S. 832, 71 S. Ct. 45 4
Smith v. State, 264 Ala. 264, 86 So. 2d 842 2
Stovall v. State, 257 Ala. 116, 57 So. 2d 641 2
Taylor v. City of Birmingham, 35 Ala. App. 133, 45 So. 2d 53, cert den., 253 Ala. 369, 45 So. 2d 60, cert. den., 340 U. S. 832, 71 S. Ct. 45 4
Whitney v. People of State of California, 274 U. S. 357, 47 Sup. Ct. 641 3

Statutes and Rule Cited.

Alabama Supreme Court Rule 32 2
General City Code of Birmingham of 1944:
Section 825 7
Section 856 7
Section 910 7
Title 28, United States Code, Section 1257 (3) 1

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BRIEF AND ARGUMENT

Of Respondent City of Birmingham in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama.

JURISDICTION.

Under the heading "Jurisdiction" the Petitioner says that the jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3), "petitioner having asserted below, and claiming here, deprivation of rights, privileges and immunities secured by the Constitution of the United States". However, this claim of Petitioner is not shown by the Record. In fact, the Record is clear that the Petitioner did not raise any issue whatso-

ever, constitutional or otherwise, before the Supreme Court of Alabama. Petitioner has ignored the requirements to obtain a review of his case before the Supreme Court of Alabama. Petitioner completely ignored Alabama Supreme Court Rule 32, which provides that the petition for certiorari to the Court of Appeals be stricken if it is not on transcript paper.

CITATIONS AND ARGUMENT RELATING TO THE JURISDICTION OF THIS COURT TO ENTERTAIN CERTIORARI IN THIS CASE.

The Supreme Court of Alabama has consistently ordered stricken every application for certiorari to the Court of Appeals of Alabama which was not submitted on transcript paper as mandatorily required by Supreme Court Rule 32. The Petitioner chose to ignore this rule and thereby has not presented to the Supreme Court of Alabama in the manner prescribed by its rules the alleged constitutional questions which he is attempting to present to this Court.

The Opinions of the Supreme Court of Alabama wherein petitions for certiorari to the Court of Appeals of Alabama were stricken because such petitions were not on transcript paper are too numerous to mention. A few of such cases are the following: **Stovall v. State**, 257 Ala. 116, 57 So. 2d 641; **Duckett v. State**, 257 Ala. 589, 60 So. 2d 357; **Smith v. State**, 264 Ala. 264, 86 So. 2d 842; **Ladd v. State**, 266 Ala. 586, 98 So. 2d 59; **McDonald v. Amason**, 267 Ala. 654, 104 So. 2d 719; **Accardo v. State**, 268 Ala. 293, 105 So. 2d 865; **Ex parte Davis**, 269 Ala. 58, 110 So. 2d 306; **Ex Parte Cranmore**, 273 Ala. 4, 129 So. 2d 688.

This Court has held that the law of practice of a State must be complied with in order to properly bring constitutional questions to this Court. An orderly method for judicial review of this Court could reasonably require no less. This Court has recognized this and has so held.

The rule in this regard is stated in **John v. Paullin**, 231 U. S. 583, 34 S. Ct. 178, 179, 58 L. Ed. 381:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. Calian v. Bransford, 139 U. S. 197, 35 L. Ed. 144, 11 Sup. Ct. Rep. 519; Brown v. Massachusetts, 144 U. S. 573, 36 L. Ed. 546, 12 Sup. Ct. Rep. 757; Jacobi v. Alabama, 187 U. S. 133, 47 L. Ed. 106, 23 Sup. Ct. Rep.; Halbert v. Chicago, 202 U. S. 275, 281, 50 L. Ed. 1026, 26 Sup. Ct. Rep. 617; Newman v. Gates, 204 U. S. 89, 51 L. Ed. 385, 27 Sup. Ct. Rep. 220; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 195, 53 L. Ed. 963, 965, 29 Sup. Ct. Rep. 546."

It has long been settled that the Supreme Court acquires no jurisdiction to review the judgment of a State court of last resort unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court of last resort. **Whitney v. People of State of California**, 274 U. S. 357, 47 Sup. Ct. 641.

It is also fully settled that where a constitutional question is not properly presented to the State Appellate Court of last resort, and for this reason, under state practice, is not decided or passed upon by such Court of last resort, the question is not before the Supreme Court on certiorari to the State court. **Barbour v. State of Georgia**, 249 U. S. 454, 39 S. Ct. 316, 317; **Louisville & Nashville Railroad Company v. Woodford**, 234 U. S. 46, 34 S. Ct. 739, 741;

Taylor v. City of Birmingham, 35 Ala. App. 133, 45 So. 2d 53, **cert. den.**, 253 Ala. 369, 45 So. 2d 60, **cert. den.**, 340 U. S. 832, 71 S. Ct. 45; **Michel v. State of Louisiana**, 340 U. S. 832, 71 S. Ct. 45.

It is therefore respectfully suggested that Petitioner's failure to comply with procedural requirements necessary to obtain a decision of the Supreme Court of Alabama on the alleged constitutional issues he raises before this Court is sufficient without more to deny certiorari in this case.

FACTS RELATING TO THE ARREST OF PETITIONER.

At the time the Petitioner was arrested there was a large crowd in and around the bus station (R. 14, 17, 18, 26, 34, 35). Captain Jack A. Warren estimated the size of the crowd to be approximately 250 or 300 persons (R. 29). The crowd was in a boisterous and jeering mood and some of the crowd yelled out, "Take the police away and we will take care of it" (R. 14). Other witnesses also testified as to the dangerous emotion of the crowd or mob. Captain James W. Garrison testified things were tense at the bus station (R. 24), and he felt the Freedom Riders were in danger actually of their lives (R. 24). The attitude was belligerent, storming, and overall anger (R. 26), and it was directed toward the Freedom Riders (R. 26). Captain Jack A. Warren testified there was a great deal of tension at the bus station (R. 29, 30): "You could see it in the faces of the people in the crowd, you could tell it in the talking to themselves and their muttering and trying to press forward toward the bus loading platform. I was very much aware of that. As a matter of fact, that is the reason I was there" (R. 29, 30). Officer T. T. Trammell testified there was a lot of unrest at the station and it seemed like everything could erupt in one fast moment (R. 35).

At the time of Petitioner's arrest there were 30 or 35 or maybe 40 policemen at the bus station, and during the week approximately 80 per cent of the entire police force was engaged at the bus station at one time or another (R. 26). The duties of these officers were described by Captain James W. Garrison as follows: "Well, we had some officers that stayed right with these Freedom Riders all the time. We had others that was assigned to keep back the crowds. We had others to work traffic at the different intersections. We had 19th Street blocked entirely and had 7th Avenue blocked between 18th and 19th Streets to avoid cars just continuing in a circle. And some were inside the bus station and stayed in the waiting room the entire time" (R. 26, 27).

The Freedom Riders were unable to get a driver to drive the bus (R. 26, 40).

The conduct of the Petitioner hindered or interfered with Chief Jamie Moore when he was placing the Freedom Riders in protective custody (R. 24, 28).

Chief Moore told the Freedom Riders who he was, i. e., Chief of Police of the City of Birmingham, and that he was taking them into protective custody due to the circumstances at the bus station (R. 13, 14, 15, 20).

Chief Moore told the Petitioner to leave the bus station, that he was not concerned with what was happening, but the Petitioner did not leave but got between Chief Moore and the Freedom Riders and would not leave on order.

Captain James W. Garrison also told the Petitioner to move on, and the Petitioner continued to interfere (R. 20).

The Petitioner knew Chief Moore and his capacity with the City (R. 43, 44).

The Petitioner was a resident of the City. The substance of the record clearly shows that at the time the

freedom riders were taken into protective custody for their own protection the Police believed all of them to be non-residents passing through the City of Birmingham en route to Montgomery, Alabama, and that they were marooned in the Bus Depot. The police knew the Petitioner to be a local man and that he did not come into the City with the freedom riders.

The presence of the freedom riders in Birmingham at that time (only a few days after a bus had been burned on the highway), the refusal of bus drivers to take out any bus on which they rode, the crowd or mob gathered around the bus station, the coming of night time presented a grave crisis. The issue of law and order was paramount. The record in this case is completely devoid of any protest, objection or resistance of the freedom riders to being taken into protective custody. The action of the police in furnishing the freedom riders with a safe place of refuge probably saved some of their lives, as well as the lives of others, and the record indicates they accepted this safe place of refuge without objection.

The Police acted to maintain law and order. The Police acted on facts which were apparent to them. The Police are not constitutional lawyers and should not be. They acted in a practical manner. Their actions were not objected to by the freedom riders. The Petitioner hindered or interfered with the action of the Police in removing the freedom riders from the scene, which removal was necessary in the judgment of the Police to prevent a riot. The action of the Police was successful. Their action prevented serious injury or loss of life. They are to be commended. The Petitioner did wilfully interfere with the police officer in maintaining law and order. There was nothing vague about the charge. The complaint (R. 1-B) specifically spelled out the manner in which he did interfere with the Chief of Police as follows:

". . . said defendant did knowingly and wilfully place himself between said officer and a group of people commonly called 'freedom riders' when said people were being placed in protective custody by said officer, and said defendant did knowingly and wilfully refuse to move out of the way of said police officer after being so ordered, contrary to and in violation of Section 856 of the General City Code of Birmingham of 1944."

The evidence sustaining the charge above set out is clear from the record. The Petitioner was convicted as charged. The Court of Appeals affirmed the judgment of the trial court. The Petitioner was not convicted of a violation of Section 825 of the City Code dealing with the crime of Assault. Although some reference to said Section 825 appears in the opinion of the Court of Appeals, the majority of the Judges concurred "in the result" and affirmed the judgment of the lower court, which judgment constituted a conviction for a violation of Section 856 of the City Code as charged in the complaint.

Lest there be some doubt that the Chief of Police was "in the discharge of a legal duty", this Court is respectfully referred to Section 910 of the General Code of the City of Birmingham of 1944, which provides, in part, as follows:

"Sec. 910. Functions of Department.

(a) General. The Police Department shall be charged with the preservation of the peace and order of the city, the protection of all persons and property within the city, and the enforcement of all criminal ordinances and all criminal laws of the city and the state. The department shall suppress all riots, disturbances and breaches of the peace, etc."

We respectfully submit that the reasonable actions of the Chief of Police of a City taken with a view of preventing an imminent riot was in the discharge of legal duties of such officer. If law and order in this County, both North and South, is to be maintained, the authority of the Police in situations such as is shown by this record should be affirmed.

It is therefore requested that the Petition for Writ of Certiorari to the Court of Appeals of Alabama in this case be denied.

Respectfully submitted,

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Certificate of Service.

This is to certify that I have this 25th day of June, 1963, served copies of the above and foregoing brief upon Jack Greenberg, James M. Nabrit III, and George B. Smith, 10 Columbus Circle, New York 19, New York, and Peter A. Hall and Orzell Billingsley, Jr., 1630 Fourth Avenue North, Birmingham, Alabama; all attorneys for the Petitioner, by depositing copies addressed to them at their respective offices as set out above in the United States Mail, postage prepaid.

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